Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

LEWIS BROWN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether two black bags containing two kilograms of cocaine are admissible at trial, where the bags are unaccounted for during a period of fifteen (15) days, and where the district court has held that there is an insufficient link between the bags and the Defendant?

2. Whether the Sixth Circuit Court of Appeals erred by instructing the District Court to permit introduction of evidence at trial, where no foundation has been laid?

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II. The Sixth Circuit Court of Appeals erred by instructing the District Court to permit introduction of evidence at trial, where no foundation has been laid.

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No.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lewis Brown, respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit issued on August 26, 1996.

OPINIONS BELOW

The Defendant-Appellee, Lewis Brown, was arrested on March 6, 1995. On March 23, 1995, a Grand Jury returned a two count Indictment naming Mr. Brown, Norman Grant, and Vincent Ottey. Count One of the Indictment alleged Conspiracy to Distribute and Possess with Intent to Distribute Cocaine, in violation of Title 21, Sections 841(a)(1) and (b)(1)(A), United States Code. Count Two of the Indictment alleged that Mr. Brown did knowingly use and carry a firearm, during and in relation to a drug trafficking crime, in violation of Title 18, Section 924(c), United States Code.

Subsequently, on or about July 18, 1995, the Grand Jury returned a Superseding Indictment naming the same individuals as the original Indictment. However, this Superseding Indictment contained an additional charge of possessing cocaine with intent to distribute, in violation of Title 21, Sections 841(a)(1) and (b)(1)(B), United States Code. The additional count in the Superseding Indictment stemmed from the alleged discovery of the black bag, allegedly containing cocaine, which was found on March 21, 1995 in the area where the defendants were arrested roughly fifteen days earlier.

On or about August 17, 1995, the Defendant-Appellee, Lewis Brown, filed Defendant Lewis Brown's First Motion in Limine (hereinafter referred to as the "Motion in Limine").

On January 13, 1996, the District Court issued an order granting the Defendant-Appellee's Motion in Limine to exclude as evidence the alleged two black bags, each allegedly containing a kilogram of cocaine.

On January 16, 1996, the Government appealed the District Court's ruling and proceedings were stayed pending appeal.

On August 26, 1996, the United States Court of Appeals for

the Sixth Circuit entered its decision reversing and remanding the decision of the United States District Court For the Northern District of Ohio Eastern Division. In its order, the United States Court of Appeals, not only held that the District Court erred in granting the Motion in Limine regarding the evidence, but also instructed the District Court to permit the introduction of the evidence at trial.

STATEMENT OF JURISDICTION

On August 26, 1996, the United States Court of Appeals for the Sixth Circuit entered its decision reversing and remanding the decision of the United States District Court For the Northern District of Ohio Eastern Division.

This Petition for Writ of Certiorari is timely filed within ninety days of the Court of Appeals decision. This Court's jurisdiction to review, on a writ of certiorari, the decision of the United States Court of Appeals reversing and remanding the decision of the United States District Court For the Northern District of Ohio Eastern Division is conferred by Title 28 U.S.C. Section 1254.

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

28 U.S.C. Section 1254 provides in pertinent part:

> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or degree;

21 U.S.C. Sections 841 provides in pertinent part:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

18 U.S.C. Section 924(c) provides in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . .

STATEMENT OF THE CASE

A. Statement of Pertinent Facts

On March 6, 1995, at approximately 7:45 a.m. federal agents arrested Levester Johnson at his home of 1029 Bloomfield, Akron, Ohio and executed a search warrant at that location.[1]

Johnson allegedly cooperated with law enforcement agents and provided information about his cocaine suppliers "Black" and "Norman".[2] Johnson allegedly stated that these two Cleveland residents, also supplied his brother Louis Johnson aka "Squally" with cocaine.[3]

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[1] An Akron-based Organized Crime Drug Enforcement Task Force (OCDETF) investigation culminated on March 6, 1995, when over 200 task force officers executed 55 federal search warrants and sought the arrest of 15 Akron cocaine dealers, including Levester Johnson. This investigation spanned 11 months. It is important to note that no time during this extensive investigation did OCDETF hear the names of Lewis Brown, Norman Grant, or "Black" or investigate them. Moreover, the OCDETF never executed a search warrant for the Defendant Lewis Brown and didn't obtain an arrest warrant for Defendant Lewis Brown until March 7, 1995.

[2] Johnson never stated the name Lewis Brown and never gave the full name of Norman Grant although he alleged that they were his two main suppliers of drugs.

[3] It is important to note that in a separate trial, United States of America v. Madison Pugh, 5:95 CR 145, Levester Johnson testified that when he was arrested, he never mentioned his brother, Louis Johnson to the police.

On or about March 6, 1995, at approximately 12:25 p.m., the defendant, Lewis Brown, was arrested by federal agents for alleged violations of federal drug trafficking laws. The defendant was arrested while he and another individual, later identified as Norman Grant, were allegedly observed approaching a home located at 1029 Bloomfield Avenue, in Akron, Ohio. Officers immediately searched the Lewis Brown and found no drugs in his possession. At the time of the Lewis Brown's arrest, Norman Grant was allegedly observed leaving the scene. According to the report of an unnamed witness, Norman Grant had in his possession a black bag. This information was not confirmed by any other source although there were numerous police officers on the scene. The alleged unnamed witness could not make a positive identification that Norman Grant was the person he had seen just twenty minutes earlier. Norman grant was arrested shortly thereafter. No drugs were found in his possession. Likewise, he was not carrying a bag. No such bag was recovered by officials after engaging in an extensive daytime search of the area on March 6, 1995.

The pertinent facts concerning the two alleged black bags, which were stipulated to by the Government, are as follows: (1) no officer or any other witness saw the defendant Lewis Brown with these alleged black bags; (2) no officer, even though there were numerous officers on the scene who allegedly saw the co-defendant, Norman Grant, could say that they saw him with these alleged black bags; (3) the only purported civilian witness who allegedly saw a black male with "a black bag" could not identify Norman Grant as that man, minutes after he allegedly saw him and could not provide any information regarding the bag's type, brand, size, composition, or any other information that would assist in the reliable identification of the bag(s); (4) the black bags had no latent fingerprints that could be retrieved; (5) the black bags were not found until fifteen (15) days after the arrest; and finally, (6) one of the officers has offered an affidavit stating that informant Johnson "normally obtained quantities of nine ounces of cocaine at a time"

from his supplies.[4] This would imply that, when Johnson requested "the regular" amount for himself and also for another buyer, he was requesting a total of 18 ounces, or about one half a kilogram -- not two kilograms, the total amount found under the porch.

B. Procedural History

The Defendant-Appellee, Lewis Brown, was arrested on March 6, 1995. On March 23, 1995, a Grand Jury returned a two count Indictment naming Mr. Brown, Norman Grant, and Vincent Ottey. Count One of the Indictment alleged Conspiracy to Distribute and Possess with Intent to Distribute Cocaine, in violation of Title 21, Sections 841(a)(1) and (b)(1)(A), United States Code. Count Two of the Indictment alleged that Mr. Brown did knowingly use and carry a firearm, during and in relation to a drug trafficking crime, in violation of Title 18, Section 924(c), United States Code.

On or about May 2, 1995, the Defendant-Appellee filed numerous discovery motions, which requested the government to provide any and all evidence, whether exculpatory or inculpatory to the Defendant. The Trial Court granted these motions.

In the month of May, 1995, Defense counsel was made aware by the government that on or about March 21, 1995, at or around the location of 619 Venita Avenue, Akron, Ohio 44320, the government allegedly received a black bag containing approximately two kilograms of cocaine. The government notified defense counsel that it attributed this bag to the Defendants in the present case.

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[4] The Government contended that Levester Johnson stated that he regularly obtained one kilogram of cocaine from "Black" beginning in 1994. However, Special Agent James Hummel's Affidavit stated that the normal amount delivered was 9 ounces.

Subsequently, on or about July 18, 1995, the Grand Jury returned a Superseding Indictment naming the same individuals as the original Indictment. However, this Superseding Indictment contained an additional charge of possessing cocaine with intent to distribute, in violation of Title 21, Sections 841(a)(1) and (b)(1)(B), United States Code. The additional count in the Superseding Indictment stemmed from the alleged discovery of the black bag, allegedly containing cocaine, which was found on March 21, 1995 in the area where the defendants were arrested roughly fifteen days earlier.

On or about August 17, 1995, the Defendant-Appellee, Lewis Brown, filed Defendant Lewis Brown's First Motion in Limine (hereinafter referred to as the "Motion in Limine"). In the Motion in Limine, Defendant asserted that any and all evidence allegedly received by the government at or around the location of 602 Avalon Avenue, Akron, Ohio, on or about March 21, 1995, must be precluded from introduction during trial by the government, for any purpose, based on three major reasons. First, that the reliability of the black bag and its contents could not be established by the government and thus under Fed. Evid. Rules 401 and 901(A) it is irrelevant and inadmissible. The Defendant also argued that the evidence should be precluded because the government could not establish that the black bag allegedly found was ever in the possession of Lewis Brown or the co-defendant Norman Grant. Finally, the Defendant argued that assuming arguendo that the government could establish that the Lewis Brown or Norman Grant had possession of an alleged bag at one time, the government could not establish that the identity of the alleged bag or its contents had remained unchanged.

On or about September 5, 1995, the Government filed the Government's Response to Defendant's First Motion in Limine (hereinafter referred to as "Government's Response"). The Government's Response stated that upon the arrest of "Black", the driver of the Nissan fled the scene and that a civilian witness observed a person run from the Nissan, the vehicle allegedly driven

by Co-Defendant Norman Grant, and allegedly described the person as a black male, black hat, glasses, carrying a black bag.

On or about December 11, 1995, undersigned counsel received a letter from United States Attorney, Samuel A. Yannucci. Among other things, this letter addressed two pertinent facts concerning the Motion in Limine. First, the letter stated that the government witness who allegedly observed a black man, with a black hat running between houses in the vicinity of Avalon Street, Akron, Ohio, on March 6, 1995, could not positively identify Norman Grant as that man when he observed Grant shortly after Grant's arrest. Moreover, the letter stated that there were no latent prints retrieved from the two black travel bags and nine plastic bags containing the cocaine.

On January 5, 1996, the Defendant filed Defendant Lewis Brown's Reply to the Government's Response to Defendant's First Motion in Limine (hereinafter referred to as "Defendant's Reply").

The Defendant's Reply asserted that these "newly released" facts simply made the Defendant's Motion in Limine even more compelling and argued, therefore, that the trial court should preclude the government from introducing for any purpose, the black bags allegedly found fifteen (15) days after the arrest of the defendants.

At a January 8, 1996, final pre-trial the trial court considered the issue of admissibility of the challenged evidence. At this final pretrial, the Government contended that during the taped conversation which allegedly took place between Levester Johnson and "Black" or Lewis Brown on March 6, 1995, when "the regular" was discussed it meant a kilogram of cocaine. Therefore, according to the government the regular for two people meant two kilograms of cocaine (the exact amount that was found at 619 Vinita). The government relied on this logic in its opposition to the Defendant's Motion in Limine.

On January 11, 1996, in Defendant Lewis Brown's Second Supplemental Reply Regarding the Defendant's First Motion in Limine (hereinafter referred to as Defendant's Second Supplemental Reply), the Defendant noted that paragraph four of Special Agent Hummel's Affidavit, dated March 7, 1995, reads as follows:

> Johnson stated that he normally obtained quantities of nine ounces of cocaine at a time from Black and Norman.

The Defendant pointed out that there are 36 ounces in a kilogram. Therefore, going by Agent Hummel's Affidavit, if "Black" and "Norman" were going to be bringing two times the regular amount, they would only be bringing 18 ounces, which is only ½ of a kilogram, not two kilograms. Therefore, the government's contention that the amount that was discussed on the tapes is the same amount that was found at 619 Vinita is false.

On January 13, 1996, the District Court issued an order granting the Defendant-Appellee's Motion in Limine to exclude as evidence the alleged two black bags, each allegedly containing a kilogram of cocaine.

On January 16, 1996, the Government appealed the District Court's ruling and proceedings were stayed pending appeal.

On August 26, 1996, the United States Court of Appeals for the Sixth Circuit entered its decision reversing and remanding the decision of the United States District Court For the Northern District of Ohio Eastern Division. In its order, the United States Court of Appeals, not only held that the District Court erred in granting the Motion in Limine regarding the evidence, but also instructed the District Court to permit the introduction of the evidence at trial.

On September 13, 1996, the Defendant Lewis Brown filed a Motion to Stay the Mandate of the United States Court of Appeals for the Sixth Circuit Pending Petition to the Supreme Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

SUMMARY

The Court of Appeals for the Sixth Circuit held that the District Court erred in holding that the issue of the admissibility of the evidence was one of authenticity, when in actuality, it was one of relevance. The Court of Appeals went on to hold that the evidence was relevant, and any prejudicial effect did not outweigh the relevance.

The Court of Appeals never gave justification for its holding that the evidence could be linked to the Defendant, and was therefore relevant. In addition, the Court of Appeals instructed the District Court to allow the introduction of the evidence at trial, without first requiring a proper foundation to be laid.

The Court of Appeals' holding incorrectly interprets the Federal Rules of Evidence and the rules of Federal Appellate Procedure as well as overstepping its authority. It is respectfully requested that this Court grant the writ of certiorari to clarify the law.

I.

1. Whether Two Black Bags Containing Two Kilograms of Cocaine Are Admissible at Trial, Where the Bags Are Unaccounted for During a Period of Fifteen (15) Days, and Where the District Court Has Properly Held That There Is an Insufficient Link Between the Bags and the Defendant?

The Court of Appeals for the Sixth Circuit held that the District Court erred because of a faulty analysis relying on Evid. R. 901(a), instead of Evid. R. 104(b) and Evid. R. 401, 402, and 403.

The Court of Appeals misinterpreted the District Court's holding and misapplied the Federal Rules of Evidence. Evidence Rule 901(a) is the starting point for any determination of whether evidence is admissible on any given case. Evidence Rule 901(a) provides in pertinent part:

> General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

The Notes of Advisory Committee on Proposed Rules states that under Subdivision (a) of Evid. R. 901 authentication and identification represent a special aspect of relevancy.

Nevertheless, the Court of Appeals held that the District Court should not have used Evid. R. 901 at all. The Petitioner respectfully asserts that the Court of Appeals erred in this holding. Clearly, it was a question of authentication, but most importantly, identification of the black bags. No-one could identify the bags and establish any type of connection between the black bags and the Petitioner. Thus, Evid. R. 901(a) was relevant and was properly relied upon by the District Court.

The Court of Appeals also held that the black bags were admissible under 104(b). FED. R. EVID. 104(b) provides that:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

The Court of Appeals correctly stated that if the government could show that the two black pouches had some connection to the Defendant Lewis Brown, they could be introduced at trial.

The Defendant's argument, as well as the holding of the District Court was that the government had not demonstrated a proper connection between the evidence and the Defendant. It should be noted that the District Court reviewed eight motions on the topic as well as supporting documents and held a pretrial hearing which primarily addressed this issue. The District Court, not the Court of Appeals, was in the best position to determine whether the factual requirement of linkage or connection had been met. Therefore, in reversing the District Court's ruling and finding abuse of discretion, the Court of Appeals reversed a factual determination, not a question of law. The Petitioner respectfully contends that the Court of Appeals reversal based on this factual determination was error.

Assuming *arguendo* that the Court of Appeals could make a factual determination, it nevertheless erred in determining that there was a sufficient linkage between the evidence and the Defendant. Whereas the District Court listed all the reasons that it felt the linkage hadn't been established, the Court of Appeals simply stated that "we have no doubt that the evidence the government was prepared to introduce at trial, which we have detailed above, is sufficient to support a finding of the fulfillment of that condition."

The facts which are undisputed are as follows: (1) no officer or any other witness saw the defendant Lewis Brown with these alleged black bags; (2) no officer, even though there were numerous officers on the scene who allegedly saw the co-defendant, Norman Grant, could say that they saw him with these alleged black bags; (3) the only purported civilian witness who allegedly saw a black male with "a black bag" could not identify Norman Grant as that man, minutes after he allegedly saw him and could not provide any information regarding the bag's type, brand, size, composition, or any other information that would assist in the reliable identification of the bag(s); (4) the black bags had no latent fingerprints that could be retrieved; (5) the black bags were not found until fifteen (15) days after the arrest; and finally, (6) one of the officers has offered an affidavit stating that informant Johnson "normally obtained quantities of nine ounces of cocaine at a time" from his supplies. This would imply that, when Johnson requested "the regular" amount for himself and also for another buyer, he was requesting a total of 18 ounces, or about one half a kilogram -- not two kilograms, the total amount found under the porch.

The Petitioner respectfully asserts that when the pertinent and undisputed facts are reviewed, it is clear that the evidence, the two black bags, cannot be properly identified and authenticated, and also that any relevance they have, if any at all, is outweighed by the unfair prejudice.

There is absolutely no case law which allows admission of evidence that is recovered fifteen days after the alleged crime was committed and has as little connection to the Defendant as is present in this case.

II.

2. Whether the Sixth Circuit Court of Appeals Erred by Instructing the District Court to Permit Introduction of Evidence at Trial, Where No Foundation Has Been Laid?

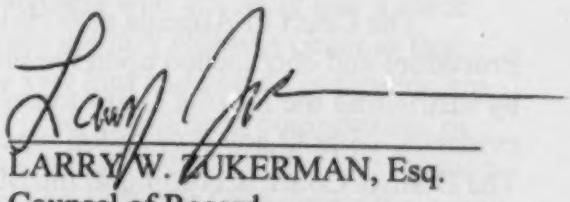
The Court of Appeals also violated the rules of Appellate Procedure and encroached upon the province of the District Court by instructing the District Court to permit the introduction of the evidence, without any foundation whatsoever being established. The District Court, according to the Mandate of the Court of Appeals, must allow the admission of the evidence, no matter what foundation, if any, is laid by the government.

Therefore, according to the Court of Appeals ruling, the evidence will be admitted, even if no-one testifies as to the authenticity, chain of custody, identity and relevance of the evidence.

This is a clear infringement of the province of the District Court and could lead to an violation of the Defendant's right to due process.

CONCLUSION

For the foregoing reasons, Petitioner, by and through undersigned counsel, hereby respectfully asserts that the petition for writ of certiorari should be granted.



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APPENDIX A--DISTRICT COURT ORDER GRANTING MOTION IN LIMINE

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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES,	)	Criminal Action
	)	No. 5:95-cr-147
Plaintiff,	)	
	)	
vs.	)	JUDGE O'MALLEY
	)	
LEWIS BROWN, et al.,	)	**ORDER**
	)	
Defendants.	)	

The Court rules on these currently pending motions as follows: (1) the motion for Order disclosing grand jury testimony (docket no. 76) is **DENIED**; (2) the motion to dismiss count two (docket no. 75) is **DENIED**; and (3) the motion in limine re admissibility of black bags containing two kilos of cocaine is **GRANTED** (docket no. 65).

A. Motion for Grand Jury Testimony.

Brown insists that Special Agent Hummel lied when, in an affidavit Brown claims was presented to the grand jury, Hummel stated that an informant named Johnson described Brown as his supplier and as "a black male, 5'10" tall, 260 pounds." Brown

argues that Johnson only described Brown as having "a large build and dark skin." Brown claims it was only Hummel's more specific statement that led to Brown's indictment. Brown asked to see the grand jury testimony of Hummel, or at least have this Court review that testimony in camera, to ensure that Hummel did not lie and that the indictment was based on proper testimony.

The Court has reviewed the testimony in camera and finds that Hummel never testified to the grand jury that Johnson had described Brown as "5'10" tall, 260 pounds," nor was Hummel's affidavit ever referred to or introduced at the grand jury proceedings. Furthermore, it is clear that Brown's indictment was not based solely on Hummel's testimony regarding Brown's physical appearance. The motion for grand jury testimony is **DENIED**.

B. Motion to Dismiss Count Two

Count Two charges Brown with a violation of 18 U.S.C. Section 924(c), which makes unlawful the carrying of a firearm while engaged in drug trafficking. Brown argues that **18 U.S.C. Section 924(c)** is an invalid statute based on United States v. Lopez, 115 S.Ct. 1624 (1995), which held that the Gun-Free School Zones Act, **18 U.S.C. Section 922(q)**, was unconstitutional because it exceeded Congress' authority under the commerce clause of the U.S. Constitution.

Every Court that has addressed this issue, has found Brown's position not well-taken. E.g., United States v. Chen De Yian, 1995 U.S. Dist. LEXIS 16068 at *23-*26 (S.D.N.Y.Nov.1, 1995). The Sixth Circuit has suggested it agrees with the government's position, as well. United States v. Green, 1995 U.S. App. LEXIS 21591 (6th Cir.July 27, 1995). Accordingly, this motion is **DENIED**.

C. Motion in Limine re Black Bag containing 2 Kilos of Cocaine.

Informant Johnson placed a telephone call to his suppliers, asking them to bring him "the regular" amount for himself and also for another person. The government asserts this meant Johnson put

in an order for two kilograms of cocaine. About two hours later, defendants Grant and Brown arrived, and Johnson identified the two as his suppliers. When the police tried to arrest Grant and Brown, they both fled--Brown on foot, Grant in a white car. The police quickly caught Brown, and chased after Grant. When Grant pulled into a dead-end street, he ditched his car, leaving it with the back trunk open. One officer then observed Grant, a black man wearing a black cap and sunglasses, running from the car through a nearby back yard. The officer did not see Grant carrying any bag or pouch. At about the same time, a gentleman living in a nearby house looked out his window to see a man wearing a black cap and sunglasses and carrying a black pouch, running through the back yard. The police officers gave chase, but did not immediately catch Grant.

About 20 minutes later, police officers arrested Grant, who was wearing a black cap and sunglasses but was not carrying any pouch. Grant had on his person the keys to the ditched car, $4,000 in cash and Johnson's pager and telephone numbers. The gentlemen who had seen a man running through his back yard could not identify Grant as that man. The police conducted a search of the area, but were unable to find a black pouch.

About two weeks later, a young boy crawled under his porch to retrieve a ball and found two black pouches, each one containing one kilo of cocaine. No fingerprints or other identifying marks were found on the pouches or their contents. The house where the cocaine was found was in the vicinity of where Grant had ditched his car and fled. Brown seeks to exclude the introduction of the two pouches and their contents.

The proponent of evidence must make a showing of authentication "sufficient to support a finding that the matter in question is what the proponent claims." Fed. R. Evid. 901(a). Here, the government claims that the two pouches and their contents found by the boy under the porch were the same pouches that Grant carried from the car when he fled. To authenticate the two black pouches, the government need only demonstrate a rational basis for its claim that the evidence is what it asserts it to be. Proof of the connection of an exhibit to the defendant may be

made by circumstantial evidence. United States v. Orena, 32 F.3d 704, 715 (2d Cir.1994); United States v. Coohey, 11 F.3d 97, 99 (8th Cir.1993). At a minimum, however, there must be some plausible showing that the physical exhibit is in substantially the same condition as when the crime was committed. United States v. Kelly, 14 F.3d 1169 (7th Cir. 1994).

In this case, the Court finds that there is an insufficient link made between the two pouches containing the cocaine and defendants Brown or Grant. No latent fingerprints were found on the pouches or on the containers inside the pouches and no other identifying information was present in the pouches when found. The police officers chasing Grant never saw him carrying any pouches. The gentleman who saw a black-capped man running through the back yard saw the man carrying only one pouch, and could not identify Grant as the man who was carrying that one pouch. Furthermore, one of the officers has offered an affidavit stating that informant Johnson "normally obtained quantities of nine ounces of cocaine at a time" from his suppliers. Hummel Affidavit at Page 4. This would imply that, when Johnson requested "the regular" amount for himself and also for another buyer, he was requesting a total of 18 ounces, or about one half of a kilogram--not two kilograms, the total amount found under the porch. Essentially, this leaves only the fact that the pouches containing the cocaine in question were found near where Grant fled his car. This fact does not sufficiently link the defendants to the two pouches.

Moreover, even if the defendants were sufficiently linked to the two pouches, the government has not made a reasonable showing that the two pouches containing the cocaine are in substantially the same condition as when the crime was committed. The pouches were not located until two weeks after the crime was committed. Assuming that Grant hid the pouches under the porch when he fled the officers, there is no telling what happened to the pouches during the two week interim. The pouches and their contents may have been found and modified by persons before they were located by the young boy, or they may not have been found and modified--there is no rational basis on which to conclude either way. Because the government is unable to demonstrate a

reasonable basis for its claim that the evidence is what it asserts it to be, the evidence does not meet the requirements of Fed. R. Evid. 901(a).

The Court adds that it has carefully reviewed every case cited by both the government and the defendants in their briefs on this matter, as well as other cases cited therein. The Court finds that the facts of this case are substantially different from any case where the evidence was admitted despite challenge by a defendant. For example, in United States v. Orena, 32 F.3d 704, 715 (2d Cir. 1994), the defendant objected to the admission of firearms found beneath a wooden deck in the back yard of the house where he was arrested. In that case, however, the defendant lived in the house and was a known mafia leader during a time of mob-related warfare. These facts demonstrated a reasonable basis for the government's claim that the firearms under the deck belonged to the defendant, as the government asserted. The other cases cited by the parties reveal the equally strong links between the defendants and the evidence at issue, as well as a sufficient basis to determine that the evidence was in substantially the same condition as when the crime was committed. Because this case presents vastly different circumstances, the motion in limine is **GRANTED**.

IT IS SO ORDERED.

"s/Kathleen M. O'Malley"
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT COURT JUDGE

APPENDIX B--SIXTH CIRCUIT ORDER REVERSING AND REMANDING DISTRICT COURT'S DECISION

FILED
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LEONARD GREEN, Clerk

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NOT RECOMMENDED FOR PUBLICATION

NO. 96-3074

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States of America,	)	
	)	
Plaintiff-Appellee,	)	
	)	**ON APPEAL FROM THE**
	)	**UNITED STATES**
	)	**DISTRICT COURT FOR**
v.	)	**THE NORTHERN**
	)	**DISTRICT OF OHIO**
Lewis Brown,	)	
	)	
Defendant-Appellee.	)	

BEFORE: GUY, and BATCHELDER, Circuit Judges, and SPIEGEL, District Judge.[5]

ALICE M. BATCHELDER, Circuit Judge. The government brings this appeal from the district court's decision to grant defendant Lewis _____

Brown's motion in limine to exclude evidence obtained subsequent to Brown's arrest. The district court granted this motion on two alternate theories, both premised on the view that the question raised by Brown's motion was properly one of authentication of the evidence. Our review of the issues on appeal leads us to conclude that the district court erred in treating Brown's motion as raising authentication issues at all. For reasons explained in greater detail below, we **REVERSE** and **REMAND** with instructions for the district court to permit the evidence to be introduced at trial.

I.

During the course of federal undercover narcotics operations, a cooperating arrestee, Levester Johnson, named Lewis Brown and Norman Grant as his cocaine suppliers. Johnson provided federal agents with information regarding defendants' drug operations, including Brown's pager number, that both Brown and Grant were Jamaican, and the name of another client. Johnson indicated that he regularly purchased substantial quantities of cocaine from Brown starting in 1994. According to Johnson, some time in 1994, Grant became involved in Brown's drug trade, both Brown and Grant delivered cocaine to Johnson, and both often called upon Johnson to inquire about his demand for the illegal drug. Finally, Johnson indicated that Brown was awaiting a twelve-kilogram shipment of cocaine which would be available by March

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1 The Hon. S. Arthur Spiegel, U.S. District Judge for the Southern District of Ohio, sittin

6, 1995.

On March 6, 1995, Johnson, working with an undercover agent of the Drug Enforcement Agency ("DEA"), arranged for a controlled purchase of (what he understood would be) two kilograms of cocaine. Late in the morning, law enforcement officials established surveillance at Johnson's residence. Shortly after noon, Johnson received a call from Brown verifying that he would soon arrive.

At nearly half past twelve, a white Nissan with two occupants arrived and parked in the street, near Johnson's residence. As the passenger approached Johnson's residence, agents of the Federal Bureau of Investigation attempted to arrest him, but he fled. During the ensuing chase, the fleeing passenger dropped a handgun, and when agents eventually seized him, they discovered that he carried identification bearing the name of Lewis Brown. Simultaneously, the driver of the white Nissan attempted to drive away from the scene. After a brief high-speed chase, police discovered the Nissan, its trunk open, abandoned in a driveway. One of the residents of the house where the car was abandoned told the police that he had seen a black male, wearing a black cap and glasses, and carrying a black, pouch type bag, running into his backyard.

Shortly thereafter, a DEA agent spotted and approached the suspect, who was wearing a black cap and glasses, and who, although he had no black pouch in his possession, was carrying currency in excess of $4,000.00, and the keys to the abandoned Nissan. The DEA agent learned that he was Jamaican by the name of Norman. His wallet contained a Florida driver's license in the name of Norman Grant, as well as Johnson's (and Johnson's brother's) telephone and pager numbers.

The resident of the house could not positively identify Grant as the man he had seen run into his backyard. Law enforcement officials searched the area near the abandoned automobile for cocaine, but found nothing.

On March 21, 1995, the local police department responded to a call from a home near the location where the Nissan had been abandoned some two weeks earlier. The resident provided police

officers with a black pouch which a minor son had discovered under the front porch of the house. The pouch contained four plastic baggies of what was later identified as cocaine. Officers searched the location where the pouch had been discovered, and found a second black bag that also contained four baggies of cocaine. The bags, whose contents totaled two kilograms of cocaine, were immediately placed into evidence.

Prior to trial, Brown brought a "First Motion in Limine" to preclude the government from introducing into evidence at trial the two black pouches or their contents. At bottom, the motion maintained that the "reliability of the black bag and its contents cannot be established under" FED.R.EVID. Rules 401 and 901(a), and that such "evidence is irrelevant to the instant case and thus, inadmissible."

On January 12, 1996, the district court ruled on the motion. Focusing on the Rule 901(a) aspect of Brown's motion, the court concluded, on two different grounds, that the evidence should be excluded from trial. First, the district court concluded that there was an insufficient link between the evidence and Brown. And second, the district court determined that the government's failure to establish that the evidence was "in substantially the same condition [as] when the crime was committed," meant that the evidence was properly excluded.

The government timely appealed.

II.

We begin with a preliminary word about our jurisdiction in this case. Brown's motion, although denominated a motion in limine, sought to exclude evidence from being introduced at trial. Our exercise of jurisdiction in this appeal is, therefore, appropriate under 18 U.S.C. Section 3731.[1]

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[1] In relevant part, 18 U.S.C. Section 3731 provides:

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or

III.

We now turn to the district court's ruling that the two black bags of cocaine should be excluded from evidence at trial. We review this ruling for an abuse of discretion. United States v. Hawkins, 969 F.2d 169, 174 (6th Cir. 1992), cert. denied, 506 U.S. 1069 (1993). Errors of law amount to an abuse of discretion. See Golden v. Kelsey-Hayes Co., 73 F.3d 648, 653 (6th Cir. 1996).

A.

The district court excluded the evidence on two bases. Proceeding under FED. R. EVID. 901, the district court first determined that:

> [T]here is an insufficient link made between the two pouches containing the evidence and defendant Brown or Grant. No latent fingerprints were found on the pouches or on the containers inside the pouches and no other identifying information was present in the pouches when found. The

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requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

. . .

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

> police officers chasing Grant never saw him carrying any pouches. The gentlemen [sic] who saw a black-capped man running through the back yard saw the man carrying only one pouch, and could not identify Grant as the man who was carrying that one pouch. Furthermore, one of the officers has offered an affidavit stating that informant Johnson "normally obtained quantities of nine ounces of cocaine at a time" from his suppliers. . . . This would imply that, when Johnson requested "the regular" amount for himself and also for another buyer, he was requesting a total of 18 ounces, or about one half of a kilogram--not two kilograms, the total amount found under the porch. Essentially, this leaves only the fact that the pouches containing the cocaine in question were found near where Grant fled his car. This fact does not sufficiently link the defendants to the two pouches.

Next, the district court held that the government could not establish that the evidence was in the same condition on March 21, 1995 (when the evidence was discovered), as it was on March 6, 1995 (the date on which the evidence was purportedly hidden beneath the porch). As the district court explained:

> Assuming that Grant hid the pouches under the porch when he fled the officers, there is no telling what happened to the pouches during the two week interim. The pouches and their contents may have been found and modified by persons before they were located by the young boy, or they may not have been found and modified--there is no rational basis on which to conclude either way.

These two theories share the common misapprehension that the issue raised by Brown's motion is whether the evidence is "authentic," and that its admissibility is, therefore, governed by FED. R. EVID. 901(a). We disagree. Brown's challenge is not that the bags or their contents are not what they purport to be. Instead,

Brown contends that the bags have not been linked to him or, in the alternative, that the government did not establish that the bags remained intact from the time they were reportedly seen in Grant's possession on March 6, 1995, until the time they were discovered some two weeks later. In our view, Brown's position boils down to an assertion about its authenticity.[2] Therefore, we think the district court improperly applied a Rule 901(a) standard in its analysis, and, as a result, abused its discretion in granting Brown's motion to exclude the evidence.

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We think that the district court's "chain of custody" analysis is simply inapposite here. In the context of this challenge to the admissibility of the black bags of cocaine, whether those bags might have been "found and modified" goes legitimately to the weight that the jury might give to them, but not to their admissibility. See United States v. Levy, 904 F.2d 1026, 1030 (6th Cir. 1990)("Absent a clear showing of abuse of discretion, challenges to the chain of custody go to the weight of evidence, not its admissibility.")(citing authorities).

B.

Ordinarily, based on the sort of legal error committed by the district court, we would simply reverse and remand for a reconsideration of the question. In this case, however, we have as complete a record before us as is likely to be developed before trial. Therefore, we will address what we understand to be the real basis of Brown's claim, namely that the evidence here is not relevant for the purposes of establishing proof of his guilt at trial.

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

FED. R. EVID. 401. In this case, Brown was initially charged with conspiracy to traffic in cocaine, 21 U.S.C. Section 846, and with carrying a firearm during and in relation to a drug trafficking offense. 18 U.S.C. Section 924(c). In a superseding indictment, Brown was additionally charged with possession with intent to distribute cocaine on March 6, 1995. In light of these charges, the black pouches filled with cocaine, which were the subject of Brown's motion in limine, have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable . . . than it would be without the evidence." The bags containing the cocaine, and the cocaine itself, if they can be shown to have some connection to Brown, have the tendency to establish that Brown trafficked in cocaine, that he was engaged in a drug trafficking offense, and that he possessed cocaine with the intent to distribute it on March 6, 1995.

The preliminary question of admissibility of the evidence Brown seeks to exclude is governed by FED. R. EVID. 104(b), which provides that:

> When the relevancy of evidence depends upon the

> fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

The Rule's language is mandatory not hortatory. It requires admission of evidence, the relevancy of which depends upon the fulfillment of a condition of fact -- in this case, that the two black pouches have some connection with defendant Lewis Brown. We have no doubt that the evidence the government was prepared to introduce at trial, which we have detailed above, is sufficient to support a finding of the fulfillment of that condition.

The only other question, as we see it, is whether the evidence might properly be excluded under FED. R. EVID. 403, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Undoubtedly, the admission of the evidence Brown seeks to exclude will have a "prejudicial" effect upon his defense. However, it is the danger of unfair prejudice with which the rule is concerned, and here, the prejudice to the defendant from introduction of this evidence is no more unfair than the prejudice of any otherwise inculpatory evidence to be admitted in the course of criminal proceedings. The evidence should not be excluded under Rule 403.

IV.

For the foregoing reasons, we **REVERSE** the district court's decision to exclude the evidence that is the subject of this appeal, and **REMAND** the cause with instructions for the district court to permit its introduction at trial.